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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JONATHAN D. et al., Persons  
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

GREGORY W.,

Defendant and Respondent;

JONATHAN D. et al.,

Appellants.

D062352

(Super. Ct. No. SJ11987D)

APPEAL from findings and orders of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Reversed and remanded with directions.

Through counsel, minors Jonathan D. and Jason W. challenge jurisdictional findings under Welfare and Institutions Code section 300.<sup>1</sup> They contend the court erred when it found

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<sup>1</sup> Unless otherwise specified, statutory references are to the Welfare and Institutions Code.

they were not at risk of being sexually abused by Jason's father, who had sexually abused their older sister, and denied jurisdiction under section 300, subdivision (j). We reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

Amanda G. is the mother of five children: daughters Z.D., A.R. and N.R., now ages 14, 10 and nine years, respectively, and sons Jonathan D. and Jason W., now ages seven and five years, respectively. Jason's father is Gregory W.<sup>2</sup> Amanda and Gregory met in 2006 when they were "on the streets."

Amanda's mental health condition is diagnosed as schizoaffective bipolar disorder. She has a significant child welfare history due to her inability to provide proper care and supervision for her children. In 2005, Amanda's mother obtained legal guardianship of the three oldest children. Amanda left Jonathan in her mother's care in 2008.

Gregory has a history of methamphetamine use and mental instability. He was sexually molested by a stranger when he was 12 years old. Gregory was charged with drug offenses in 2004, 2005, 2008 and 2009. He was on parole from 1992 to 2007, and claimed he had been charged with two counts of first degree murder that were later dismissed.

In April 2008, the San Diego County Health and Human Services Agency (Agency) initiated dependency proceedings on Jason's behalf due to Amanda's and Gregory's methamphetamine use. Gregory successfully completed his case plan and maintained his sobriety. The court returned Jason to Gregory's care under a plan of family maintenance services and terminated dependency jurisdiction in December 2009.

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<sup>2</sup> Z.D.'s father and A.R, N.R. and Jonathan's father were not involved in the dependency proceedings.

At some point in time before May 2010, Gregory, Amanda and the children began living together. Starting in May, A.R., who was mildly mentally retarded, made a series of physical abuse allegations against Gregory. When asked when this occurred, A.R. said "tomorrow." She also said the abuse happened in a dream. In November 2010, A.R. said Gregory put his private in her butt and bought her ice cream so she would not tell anyone. The Agency deemed the allegations of physical abuse unfounded and the allegation of sexual abuse inconclusive.

In November 2011, the Agency investigated an allegation Gregory was sexually abusing 12-year-old Z.D. Amanda said Gregory told her he had been having sexual relations with Z.D. for two years and was in love with her. Z.D. denied the allegations. Gregory and Amanda refused to cooperate further with the investigation, and the Agency deemed the sexual abuse allegations inconclusive.

In May 2012, A.R. and N.R. told school personnel Z.D. was pregnant and their dad was the baby's father. They said it was a secret. In interviews with a social worker, A.R., N.R. and Jonathan said Z.D. and Gregory shared a bedroom and slept in the same bed. Their mother slept in Z.D.'s bedroom. N.R. said, "If [Z.D.] doesn't want to sleep with dad, daddy asks someone else and they say yes." N.R. said she sometimes slept with Gregory, and sometimes she and Jonathan slept with Gregory. She denied any inappropriate touching or tickling, and stated no one had touched her private areas.

A.R. said she sometimes slept with her dad. She denied any touching, saying, "We talk and we sleep." A.R. expressed a desire to marry Gregory.

Jonathan denied sleeping with Gregory. He denied anyone had touched his private parts. For discipline, Gregory spanked him with a belt on top of his clothing. Jonathan said Gregory sometimes spanked the other children but he did not spank Z.D.

The social worker tried to talk to four-year-old Jason about private body parts. Jason did not respond but occasionally grabbed his penis over the top of his clothing. He denied that anyone had touched his penis, wanted to see his penis or wanted him to touch them in that area. During his first dependency case, Jason developed genital warts while he was in foster care. Physicians, including a child abuse expert, said it was not possible to determine how Jason had acquired the warts.

Z.D. initially denied having sexual relations with Gregory. She claimed a boy named Adrian was the baby's father. Z.D. later admitted Gregory was the father of her baby. She said she and Gregory loved each other, and she had started sleeping in his room in December or January. She denied that any of her siblings had engaged in sexual activities with Gregory.

In an interview with a police detective, Gregory admitted he had impregnated Z.D. Gregory, who was then 41 years old, said he was in love with Z.D. He said she was always by his side, helping him, and took on the position of being his wife. They wore rings to signify their relationship as a couple. The pregnancy was planned. Gregory told Z.D. they would be able to marry sooner if she was pregnant. Gregory denied having sexual feelings toward the other children in the home. He said eight-year-old N.R. was "rubbing on him, trying to follow in her sister's footsteps" but he told her to stop because her actions were inappropriate.

Amanda attempted suicide in January 2012 after Gregory told her he was in love with Z.D. Amanda was hospitalized for three days. When she returned home, she stayed in Z.D.'s bedroom. Amanda did not ask Gregory to move out of the home because she needed his help

to care for the children. She was heavily medicated at that time. Amanda claimed she did not know about Z.D. and Gregory's sexual relationship until the Agency intervened. She knew Z.D. was pregnant. Z.D. and Gregory told her a boy named Adrian was the baby's father.

The Agency filed a petition under section 300, subdivision (d), alleging Gregory had sexually abused Z.D. It also filed petitions under section 300, subdivision (j), alleging Z.D.'s siblings were at substantial risk of being sexually abused. The Agency later amended the petitions to include a count under section 300, subdivision (b), alleging the children had suffered, or were at substantial risk of suffering, serious physical harm or illness because of Amanda's mental health condition and Gregory's inability to provide for them due to his incarceration on charges of statutory rape and sexual abuse.

The jurisdictional and dispositional hearings were held on June 29 and July 5, 2012. Over the objection of minors' counsel, the Agency asked the court to dismiss the petitions filed on behalf of Jonathan and Jason under section 300, subdivision (j). The Agency asserted it could not meet its burden of proof under *In re Maria R.* (2010) 185 Cal.App.4th 48 (*Maria R.*).

The court admitted the Agency's reports in evidence, which included descriptions of the social worker's interviews with Amanda, Gregory and the children, as detailed above. The social worker testified. Amanda and Gregory did not present any affirmative evidence.

The social worker testified Gregory's sexual abuse of Z.D. placed Jonathan and Jason at risk of harm because they knew about Z.D.'s and Gregory's relationship and Z.D.'s pregnancy, and viewed those circumstances as normal. If Jonathan or Jason were approached by a perpetrator, they would think sexual abuse was normal, increasing their risk of being sexually abused.

The social worker knew of cases in which perpetrators of sexual abuse on females decided to experiment with males or abused children of different ages. There were reports the children were in bed with Gregory. Jonathan said he liked to go into Gregory's room. Amanda was not protective of the children. The social worker was concerned that Amanda might choose another predator as her next partner and that predator might be interested in young boys.

The social worker acknowledged that in the five conversations she had had with Jonathan, he did not make any disclosures of sexual abuse or behavior that could be described as sexual abuse. She believed Jonathan and Jason were at risk of emotional harm due to Gregory's sexual abuse of Z.D.

The court denied the Agency's request to dismiss the counts filed under section 300, subdivision (j) on behalf of Jonathan and Jason. The court said Gregory repeatedly sexually abused Z.D. and psychologically manipulated her siblings. Amanda's long history of incapacity permitted Gregory to sexually abuse Z.D. In addition to committing individualized sexual acts, Gregory created a culture in which the abused child was honored. Under Gregory's influence, the children did not view his sexual relationship with their sister as abhorrent. Instead, they viewed it as a prize.

The court found that the social worker's testimony was credible and her conclusions regarding risks to the children were grounded in fact and persuasive. The social worker was aware of cases in which sexual predators of girls and sexually abused boys. The court observed that Z.D. was petite and child-like, and appeared to be significantly younger than 13 years. Gregory said Z.D. was responsible for their relationship. He asserted N.R. had rubbed up against him of her own free will. Although it was discounted at the time because of her

mental disability, A.R. said Gregory had sexual contact with her. Gregory decided to intensify his relationship with Z.D. after the November 2011 sexual abuse investigation, indicating he enjoyed taking risks. The court found that all the children would need significant counseling and daily mentoring to address the impropriety of Gregory's behavior and the failure of the adults in the home to protect them.

The court said it was required to follow *Maria R.*, in which this court rejected a finding of jurisdiction under section 300, subdivision (j) because there was no evidence to show the perpetrator of sexual abuse on a daughter had a sexual interest in male children, and there was not any scientific or empirical evidence supporting the conclusion that a perpetrator of sexual abuse on a female child was likely to sexually abuse a male child. The court found that the Agency did not meet its burden to show that Gregory had a sexual proclivity to male children or had acted in some way to molest Jonathan and Jason, and did not take jurisdiction under section 300, subdivision (j).

The court sustained the petitions filed under section 300, subdivision (b), removed Jonathan and Jason from parental custody, and ordered a plan of reunification services for Amanda. In Jason's case, the court also ordered a plan of reunification services for Gregory.

## DISCUSSION

### A

Jonathan and Jason contend the court erred when it concluded there was insufficient evidence to sustain a finding that they were at substantial risk of being sexually abused. They acknowledge there is no evidence to show that Gregory had sexually abused them, or that he had a sexual proclivity for male children. Jonathan and Jason maintain that the court's findings that Gregory's behavior was deviant and abhorrent; Jonathan slept with Gregory on one

occasion at Gregory's invitation; Amanda was unable to protect her children; and Gregory had created a culture in which the abused child was exalted and honored were sufficient to sustain jurisdictional findings under section 300, subdivision (j).

## B

Section 300, subdivision (j) provides a basis for dependency court jurisdiction where the child's sibling has been abused or neglected as defined in subdivision (a) (serious physical harm), (b) (inadequate care), (d) (sexual abuse), (e) (severe physical abuse) or (i) (act of cruelty). (*Maria R.*, *supra*, 185 Cal.App.4th at p. 61; *In re R.V.* (2012) 208 Cal.App.4th 837, 842-843 (*R.V.*)). Where the petition alleges the child's sibling has been sexually abused as defined in section 300, subdivision (d), the court may assume jurisdiction under section 300, subdivision (j) if it finds, after considering the totality of the family's circumstances, there is a substantial risk to the child in the family home under *any* of the subdivisions listed in subdivision (j). (*Maria R.*, at p. 65; *R.V.* at p. 846; see also § 355.1, subd. (d) [a finding that a parent has committed an act of sexual abuse is prima facie evidence in any proceeding the subject minor is a person described by subd. (a), (b), (c) or (d) of § 300].)

With respect to a sibling's risk of being sexually abused, as defined in section 300, subdivision (d),<sup>3</sup> *Maria R.* rejected a rule of general applicability that had been adopted by a

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<sup>3</sup> Section 300, subdivision (j) states: "The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions." Thus, substantial risk of sexual abuse under section 300, subdivision (j) is defined by reference to section 300, subdivision (d).

Section 300, subdivision (d) defines the phrase "sexual abuse" by reference to Penal Code section 11165.1, which enumerates specific sex acts committed by the perpetrator on the victim. The collateral damage on a child that might result from the sexual molestation of a sibling does not provide sufficient grounds for jurisdiction under section 300, subdivision (d). (*Maria R.*, *supra*, 185 Cal.App.4th at pp. 67-68.)



line of other cases. (*Maria R.*, *supra*, 185 Cal.App.4th at p. 68, discussing *In re P.A.* (2006) 144 Cal.App.4th 1339, 1347 & *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1414; see also, *In re I.J.*, review granted Sept. 19, 2012; S204622.) Those cases held that aberrant sexual behavior by a parent places the victim's siblings, regardless of gender, at risk of aberrant sexual behavior, and that is sufficient per se to sustain a jurisdictional finding under section 300, subdivision (j). (*In re P.A.*, at p. 1347; *Andy G.*, at p. 1414.) In *Maria R.*, we refused to apply such a per se rule in the absence of any evidence indicating the perpetrator may have an interest in sexually abusing male children or any scientific or empirical evidence supporting the general conclusion that a person who sexually abuses a female child is likely to sexually abuse a male child. (*Maria R.*, at pp. 67-68.) In *R.V.*, we explained the holding in *Maria R.* was a narrow one: a parent's sexual abuse of a daughter does not always mean a son is at risk of sexual abuse by that parent. (*R.V.*, *supra*, 208 Cal.App.4th at p. 848.)

Notwithstanding the clear language of the statutory definition of "sexual abuse" under section 300, subdivision (d), we also recognize the "commonsense notion that any child who is residing with a parent . . . who has sexually abused the child's sibling, and/or a parent who has minimized the sexual abuse of the child's sibling, is living in a dysfunctional and potentially harmful environment." (*Maria R.*, *supra*, 185 Cal.App.4th at p. 68; *R.V.*, *supra*, 208 Cal.App.4th at p. 848.) Thus, in assessing risk to the child under section 300, subdivision (j), the court considers "the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." (§ 300, subd. (j).) "The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the

circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance." (*Maria R.*, at p. 64.)

## C

The juvenile court misinterpreted and misapplied *Maria R.* Its interpretation of the nature of the evidence required to sustain a finding of risk of sexual abuse was unduly restrictive. The court did not believe it could sustain jurisdiction under section 300, subdivision (j) if it did not have any evidence showing that Gregory had an interest in sexually abusing male children. As we explained in *R.V.*, *Maria R.* does not prevent the court from considering other factors that have been admitted in evidence to establish a correlation between a parent's predatory behavior and the risk of sexual abuse to a particular child. (*R.V.*, *supra*, 208 Cal.App.4th at p. 847.)

Further, the facts in this case are materially different from those in *Maria R.* In *Maria R.*, there was no evidence to show the son was aware of, or had been exposed to, his sisters' sexual abuse. (*Maria R.*, *supra*, 185 Cal.App.4th at p. 69.) Jonathan and Jason lived in a home that accepted child sexual abuse as normal, and elevated the status of the child sexual abuse victim. In addition, unlike *Maria R.*, there was expert testimony regarding the risk to Jonathan and Jason as a result of the sexual abuse of their sister. (See, e.g., *R.V.*, *supra*, 208 Cal.App.4th at p. 847.) The social worker testified that in view of Amanda's incapacity to parent and protect her children, the family's acceptance of child sexual abuse increased the risk that Jonathan and Jason would be sexually abused by any predator, including those who focused

solely on male children or acted without regard to the child's sex. In determining whether a sibling of a sexually-abused child is at risk of sexual abuse, as that term is defined under Penal Code section 11165.1,<sup>4</sup> the court is not restricted from considering evidence that may establish a correlation between a parent's sexually deviant behavior and the risk of sexual abuse to the subject child. (*R.V.*, at p. 847.)

In addition to its misinterpretation of the evidentiary requirements under *Maria R.*, the court should have, but did not, determine whether Jonathan and Jason were described by any other subdivision enumerated in subdivision (j). (*Maria R.*, *supra*, 185 Cal.App.4th at pp. 65, 67-68 [the court may assume jurisdiction under section 300, subdivision (j) if, after considering the totality of the child's circumstances, it finds there is a substantial risk to the child under any subdivision enumerated in subdivision (j)]. The court was acutely aware of the many risks in the home. Those risks included Gregory's sexually deviant behavior, his grooming of the children to accept child sexual abuse as normal, his high-risk behavior after the Agency investigated allegations of sexual abuse, blaming Z.D. and N.R. for his inappropriate sexual behaviors, using a belt to discipline Jonathan, Amanda's incapacity and both parents' histories of mental instability.

The court's failure to consider whether Jonathan and Jason were described by section 300, subdivision (j) on grounds other than risk of sexual abuse leads to the absurd conclusion the only jurisdictional grounds for Jonathan's and Jason's dependency proceedings were

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<sup>4</sup> The Legislature has not adopted a less restrictive definition of sexual abuse for the purpose of establishing risk to a sibling of a sexually-abused child under section 300, subdivisions (j) and (d). (See *Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1619 [where the Legislature has prescribed the meaning to be given to a precise term used in a statute, that meaning is generally binding on the courts].)

Amanda's incapacity and Gregory's absence from the home, as alleged under section 300, subdivision (b), while ignoring Gregory's sexually predatory behavior, his impregnation of a 12-year-old child, the normalization of that behavior and his history of mental instability, crime and substance abuse. In view of the court's restrictive interpretation and misapplication of *Maria R.*, we conclude that reversal is required to avoid a miscarriage of justice. (Cal. Const., art. VI, § 13.)

#### DISPOSITION

The findings and orders under section 300, subdivision (j) are reversed, and the matter is remanded to the juvenile court. The court is directed to proceed under sections 300 and 355.1, subdivision (d).

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.